in width is high seas. This position of the State Department is amply supported by the precedents of international law and is not contrary to the decision of the International Court of Justice in the *Fisheries Case,* I. C. J. Reports, 1951, p. 116. The limitation on inland waters which was adopted by the district court in this case is in accord with the views of the Special Master in *United States* v. *California.*

The case of *Manchester* v. *Massachusetts,* 139 U. S. 240, is not authority for the proposition that a state may extend its boundaries beyond the territorial limits of the United States. There, inland waters of a bay, concededly within the territorial limits of the United States, were involved. Nor does a state have authority to speak for the United States in this field where foreign policy is of primary concern. *United States* v. *California,* 332 U. S. 19, 35; *United States* v. *Louisiana,* 339 U. S. 699; *United States* v. *Texas,* 339 U. S. 707, 719; *United States* v. *Belmont,* 301 U. S. 324, 331.

The provisions of the California Constitution fixing its boundaries, which were approved by Congress at the time California entered the Union, are not properly construed as bringing the water area here in question within the boundaries of California. Both state and federal cases have dealt with this area as high seas. *In re Marincovich,* 48 Cal. App. 474, 192 Pac. 156; *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941; *Wilmington Transportation Co.* v. *Railroad Commission*

of California, 166 Cal. 741, 137 Pac. 1153, affirmed, 236 U. S. 151.

II

By definition, the Civil Aeronautics Act extends to transportation "between places in the same State of the United States through the air space over any place outside thereof" (Section 1 (21) (a)). This clearly covers transportation between points in California when such transportation requires passage through the air space over the high seas. Not only is the statutory language unambiguous; the legislative history demonstrates that the words "any place outside" were deliberately selected for the reason that they would cover "transportation between points in the same state over a foreign country or the high seas as well as over another state." Hearings before a Subcommittee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess., on S. 3027, p. 68.

The scheme of regulation provided by the federal act is complete and comprehensive. And the Board has fully exercised its authority over all phases and details of the Catalina operation. There is accordingly no room for California to exercise rate-making or other regulatory control over the transportation involved. *Wilmington Transportation Co.* v. *Railroad Commission of California,* 236 U. S. 151, 152; *Wilmington Transportation Co.* v. *Railroad Commission of California,* 166 Cal. 741, 137 Pac. 1153.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HUIS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. MCKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLANTS

v.

UNITED AIR LINES, INC., A CORPORATION; CATALINA AIR TRANSPORT, A CORPORATION; AND THE CIVIL AERONAUTICS BOARD, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE CIVIL AERONAUTICS BOARD

OPINION BELOW

The opinion of the district court (R. 47) is reported at 109 F. Supp. 13.

JURISDICTION

The final decree of the three-judge district court was entered on January 28, 1953 (R. 65, 67). A motion for new trial was filed on February 6, 1953 (R. 68), and denied on February 20, 1953 (R. 104). The petition for appeal was filed and allowed on March 27, 1953 (R. 105, 106).

The jurisdiction of this Court is invoked under 28 U. S. C. 1253, which provides for a direct appeal to this Court from an order granting or denying an injunction in a suit required to be heard and determined by a statutory three-judge court. On June 15, 1953, this Court postponed further consideration of its jurisdiction until the hearing on the merits (R. 265).

QUESTIONS PRESENTED

The three-judge district court held that air operations of appellee United Air Lines between the mainland of California and Santa Catalina Island (a part of California lying in the Pacific Ocean some thirty miles west of the mainland) were subject to the exclusive jurisdiction of the Civil Aeronautics Board, pursuant to provisions of the Civil Aeronautics Act which confer authority to regulate transportation between places in the same State "through the air space over any place outside thereof." The decree enjoins further attempts by the appellant transportation authorities of the State of California to assume regulatory control over the operations.

The questions raised by the appeal which are of primary concern to appellee Civil Aeronautics Board may be stated as follows:

1. Whether the waters of the Pacific Ocean which lie between the three-mile marginal belt along the mainland of California and the three-mile marginal belt surrounding Santa Catalina Island are outside the boundaries of the State of California.

2. If so, whether the United States, by the provisions of the Civil Aeronautics Act, has assumed exclusive jurisdiction to regulate United's operations between the mainland and Santa Catalina Island.

STATUTE INVOLVED

The Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.*, provides in part:

> Section 1. As used in this Act, unless the context otherwise requires—
>
> * * * * * *
>
> (10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.
>
> * * * * * *
>
> (21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation

or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Other provisions of the Act are set forth in the Appendix, *infra*, pp. 39–42.

STATEMENT

This is an appeal from a judgment granting declaratory and injunctive relief against attempts by appellants, the transportation regulatory authorities of the State of California, to assume regulatory control over the air transport opera-

tions of United Air Lines between the mainland of California and Santa Catalina Island. The island, a part of California, lies some thirty miles west of the mainland in the Pacific Ocean (R. 36; see, also, map, *infra*, p. 51). The air route in question extends from Los Angeles and Long Beach-Wilmington, on the mainland, to Avalon, on the island. The operations involve the transportation of persons and property.

United's operations over the Catalina route are conducted, with the approval of the Civil Aeronautics Board, under authority of a certificate of public convenience and necessity issued by the Board in 1939 to the predecessor of appellee Catalina Air Transport. This certificate was issued on findings by the Board that the boundaries of California do not extend beyond a distance of three miles from the shoreline of the mainland, and beyond a distance of three miles from the shoreline of Santa Catalina Island (R. 58). The grant of authority was rested upon the conclusions (1) that flights between the mainland and the island would necessarily pass over waters outside the boundaries of California, and (2) that the "air transportation" which the Civil Aeronautics Act, Section 1 (21) (a), subjects to federal regulation includes transportation between places in the same State "through the air space over any place outside thereof." (R. 35,

58); *Wilmington-Catalina Air, Grandfather Certificate*, 1 C. A. A. 431.[1]

Since 1939, the carriers authorized to fly the Catalina route have filed their tariffs with the Civil Aeronautics Board (R. 59), and their operations have been subject to detailed regulatory control by the Board (see R. 57–60). Tariffs for the operations have never been filed with the California Commission (R. 36, 59), and the Commission evinced no interest in the route until 1951, some twelve years after the Board had assumed full regulatory control (R. 47). In that year, by letters dated September 20, 1951 (R. 168, 36, 39), and December 27, 1951 (R. 168, 36, 44), the California Commission directed United to file tariffs for the Catalina operations, asserting that those operations were not within the

[1] The initial certificate was issued by the Board on October 13, 1939, under the "grandfather" provisions of the Civil Aeronautics Act, and authorized operations between Avalon and Wilmington. In 1941, the Board extended the route to Los Angeles and reissued the certificate in the name of the appellee Catalina Air Transport. R. 35, 58; *Catalina Air, Service to Santa Catalina Island*, 2 C. A. B. 798. In 1942, the Board authorized a suspension of operations in recognition of the fact that the carrier's equipment had been requisitioned for war purposes (R. 59). Thereafter, in 1946, the Board approved an operating contract between Catalina Air Transport and United Air Lines whereby United agreed to discharge all of the obligations of Catalina Air Transport under its certificate of public convenience and necessity. R. 35, 59; *United Air Lines, Operation of Catalina Air Transport*, 6 C. A. B. 1041. Operations under the contract were begun by United in 1946 and have continued to date (R. 59).

coverage of the Civil Aeronautics Act, but were "intrastate" activities "subject to regulation" by the Commission (R. 39, 44).

On June 25, 1952, the air carrier appellees filed a complaint for declaratory and injunctive relief (R. 1), alleging that the California Commission was threatening to bring penalty and reparation actions against them for their failure to file tariffs, and that they had no other adequate remedy (R. 4–6). The complaint asserts, in the alternative, that the Catalina operations are under the exclusive jurisdiction of the Civil Aeronautics Board; that, if the operations are subject to State control, air carriers are not subject to the penalty provisions which the Commission threatened to invoke; and that, if such penalty provisions are applicable, they are unreasonable and oppressive, in violation of the Fourteenth Amendment to the Constitution of the United States (R. 5).[2] The Civil Aeronautics Board intervened as a party plaintiff (R. 13, 21), alleging that it had exclusive jurisdiction over the Catalina operations (R. 22, 25).

A three-judge court was convened because of the carriers' contention going to the constitutionality of the California penalty provision. After trial, the district court held, *inter alia*, that

[2] The complaint alleges (R. 4–5) that the provision of the California Public Utilities Act with which the carriers were threatened provides for penalties of $2,000 per day for every day of violation.

there was a concrete controversy between the parties; that there was no adequate remedy in the state courts; that, in any event, the court ought not forego its jurisdiction, inasmuch as the primary question was the reach of a federal statute; and that the cause was ripe for declaratory and injunctive relief (R. 50, 63).

With respect to the merits, the court held that at least the waters between the three-mile marginal belts along the coastline of the mainland of California and surrounding Catalina Island were a part of the "high seas" and "wholly outside the territory and jurisdiction of the State of California" (R. 49, 63). It concluded, further, that transportation by aircraft between the mainland and the island constitutes air transportation as defined by the Civil Aeronautics Act (R. 64), and that the powers conferred upon and exercised by the Board "leave no room for State regulation * * * (R. 64).

Holding that it had been properly convened and that it had jurisdiction to determine the case on non-constitutional grounds (R. 49, 62), the three-judge court entered a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the Catalina operations, and enjoining appellants from interfering with its authority (R. 66–67).

SUMMARY OF ARGUMENT

I

Appellants, adopting the position previously urged by California before the Special Master in *United States* v. *California*, No. 6, Original, assert that the boundary of California runs three miles west of a line enclosing all of the offshore islands so that the transporation here involved does not pass over an area outside of California. The area to Santa Catalina Island thus claimed as California territory consists of a stretch of twenty-four miles of deep water which is generally used and considered as part of the high seas.

The establishment of the external boundaries of the United States along its coasts is a political matter to be determined by the executive branch or by Congress rather than by the courts. *Jones* v. *United States*, 137 U. S. 202; *United States* v. *California*, 332 U. S. 19. The function of the courts is merely to apply a determination made by the Executive or by Congress.

As indicated by two letters from the State Department (Appendix *infra*, pp. 42–50), the executive branch takes the position that the territorial waters of the United States are to be measured from a line following the sinuosities of the coast rather than from a line drawn from point to point; that islands lying offshore have their own marginal belts; and that the area between the mainland and the islands if more than six miles

ARGUMENT

Introduction

The Civil Aeronautics Board intervened as a plaintiff below for the purpose of safeguarding its jurisdiction (R. 25). Cf. *Securities and Exchange Commission* v. *United States Realty and Improvement Co.*, 310 U. S. 434. Its primary concern is with a correct determination of the ultimate question—Are air operations between the mainland of California and Santa Catalina Island (and similar operations) subject to federal or to state regulation? Appellants contend, *inter alia*, that this question should not now be reached by this Court, while the air carrier appellees urge that it is ripe for decision. The issues preliminary to the merits have been fully briefed by these parties, and this brief will be confined to those matters which bear directly upon the ultimate issue—federal *versus* state regulatory authority in the area involved.

I

The waters of the Pacific Ocean which lie between the three-mile marginal belt along the mainland of California and the three-mile marginal belt surrounding Santa Catalina Island are outside the boundaries of the State of California

The Catalina operations were declared by the district court to be within the coverage of the Civil Aeronautics Act because air transportation between the island and the mainland requires passage above waters outside the boundaries of Cali-

fornia, and hence "between places in the same State of the United States through the air space over any place outside thereof" within the meaning of Section 1 (21) (a) of the Act (*supra*, pp. 3–4).[3] Appellants attack the correctness of this holding, asserting that the entire area is within the boundaries of California and adopting the position previously taken by California in the proceedings before the Special Master appointed by this Court in *United States* v. *California*, No. 6, Original, this Term.[4]

---

[3] There is no issue here presented of whether the Civil Aeronautics Act would preempt the field of economic regulation of the Catalina operations if those operations involved only flights over California territory as, for example, do flights between Los Angeles and San Francisco. *United Air Lines* v. *Public Utilities Commission of California*, 342 U. S. 908, where this Court dismissed an appeal from a rate order of the California Commission for want of a substantial federal question, involved air transportation between Los Angeles and San Francisco only, and is inapposite here.

[4] That case originated in a complaint filed by the United States seeking a determination of the ownership of, or paramount rights in, the lands and minerals underlying the three-mile marginal belt lying seaward of the ordinary low water mark and outside the inland waters of California. This Court determined that the paramount right to these lands and resources was vested in the United States (*United States* v. *California*, 332 U. S. 19, 804). Thereafter the United States moved for a supplemental decree fixing the landward limit of the marginal belt along certain segments of the California coast (Petition for Entry of Supplemental Decree filed January 29, 1948). This Court by a series of orders has assigned the matters arising under this petition to a Special Master to take evidence and report (334 U. S. 855; 337 U. S. 952; 342 U. S. 891). In these proceedings, the United States has claimed that the line forming the shoreward limit of the

Santa Catalina Island is a part of Los Angeles County and was stipulated below as lying in the Pacific Ocean some thirty miles west of the Los Angeles area of the mainland of California (R. 36, see map, *infra*, p. 51). The waters immediately eastward of the Island are known as the San Pedro Channel. This channel connects areas of open water which are plainly a part of the high seas. The depth of the channel at its deepest is in excess of 450 fathoms, placing it beyond the limits of the continental shelf.[5] It is obviously unsuitable for the shelter or anchorage of vessels. The rules of navigation applicable to the high seas are in force in the channel,[6] and it is freely

---

marginal belt follows the sinuosities of the shore extending to the low water mark except at the entrances of harbors, rivers, and bays. California has claimed that there are large areas of inland waters intervening between the shore and the marginal belt, its most extensive claim of inland waters covering the entire area between the mainland and the offshore islands, including the area here in question. The Special Master submitted his report on October 14, 1952, accepting, so far as is here material, the contentions of the United States and specifically rejecting the California claim that the waters here involved are inland. This report was ordered filed on November 10, 1952 (344 U. S. 872). Exceptions to it have been filed by both California and the United States.

[5] See House Report No. 215 to accompany H. R. 4198, 83d Cong., 1st Sess., p. 6, where the limits of the outer continental shelf are said generally to occur at a depth of 100 fathoms. The location of the outer limits of the continental shelf is of no significance here, however, since the waters over the shelf beyond the territorial limits of the United States are high seas. See Section 3 (b) of the Outer Continental Shelf Lands Act, P. L. 212, 83rd Cong., 1st Sess.; 67 Stat. 462.

[6] Pursuant to authority conferred by 33 U. S. C. 151 to establish "lines dividing the high seas from rivers, harbors,

navigated by the ships of all nations.' In short, the channel has all the characteristics of the high seas.

Because of the distance between the island and the mainland, the district court did not consider the question of whether the three-mile belts of marginal sea adjacent to the California coast and over which the United States asserts jurisdiction are outside of the boundaries of California for purposes of the Civil Aeronautics Act (R. 63), nor is that question in issue here.[8] The district court held in substance that Santa Catalina Island lies seaward of the marginal belt along the coast line of the mainland and outside of inland waters and that the island has its own three-mile marginal belt (R. 63). The waters intervening between these belts, some twenty-four miles, were held by the district court to be part of the "high seas" and "not within the State of California" (R. 49, 63).

The assertion and maintenance of jurisdiction over our external boundaries, being a matter of

---

and inland waters," the Coast Guard has established the line of demarcation between the "high seas" and the mainland to be the breakwater of San Pedro Bay (33 Code Fed. Reg. 82.135).

[7] Much testimony was taken before the Special Master in *United States* v. *California* on the use of these waters, and it was uncontested that they were extensively used for inter state and foreign commerce.

[8] *Cf. United States* v. *California*, 332 U. S. 19; the Submerged Lands Act (P. L. 31, 83d Cong., 1st Sess., 67 Stat. 29); and *Toomer* v. *Witsell*, 334 U. S. 385.

foreign relations and national defense, is essentially a political matter to be fixed and executed within the limits set by international law by the political branches of the government, the President and Congress, rather than the courts. *In re Cooper,* 143 U. S. 472, 502–503; *Jones* v. *United States,* 137 U. S. 202, 212–214; see *United States* v. *California,* 332 U. S. 19, 34. Decisions in the field of foreign policy "are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *C. & S. Air Lines* v. *Waterman Corp.,* 333 U. S. 103, 111. The function of the courts in deciding a dispute where such political judgments are pertinent is to apply the policy which has been adopted by the executive or Congress. *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377.

As good an example as any of this correlation of the functions of the political branches and the courts in this field is found in the assertion and establishment of jurisdiction over the three-mile marginal belt itself. The claim was first made by the executive branch of the government. See Jefferson's Letter to the British Minister dated November 8, 1793 (H. Ex. Doc. 324, 43d Cong., 2d Sess., 554; 1 Moore, *Digest of International Law,* 702); Letter of Secretary of State Bayard to Secretary of Treasury Manning, dated May 28, 1886 (1 Moore, *Digest of International*

Law, 718). Thereafter it was, and still is, given judicial recognition. *Church* v. *Hubbart*, 2 Cranch 187, 234 (1804); *The Ann*, 1 Fed. Cas. No. 397, p. 926 (C. C. D. Mass. 1812); *United States* v. *Smiley*, 27 Fed. Cas. No. 16,317, pp. 1132, 1134 (C. C. N. D. Cal. 1864); *Manchester* v. *Massachusetts*, 139 U. S. 240, 257–258 (1891). See *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 122–123. In *United States* v. *California*, 332 U. S. 19 at 33, this Court stated:

> That the political agencies of this nation both claim and exercise broad dominion and control over the three-mile marginal belt is now a settled fact.

Congressional action recognizing a territorial zone in the sea was not taken until 1910 when a statute regulating seal fishing covered limited offshore waters (36 Stat. 326, 328). The most recent recognition of the national interest in this area is found in Section 6 (a) of the Submerged Lands Act (P. L. 31, 83d Cong., 1st Sess.; 67 Stat. 29, 32).*

---

* "The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act."

The position taken by the executive department on the location of the external boundary of the United States along its coasts is authoritatively set forth in two letters addressed by the State Department to the Attorney General, dated November 13, 1951, and February 12, 1952.[10] These letters are of such importance in determining the issue here involved that they are set forth in full in the Appendix of this brief, *infra*, pp. 42–50.[11] Insofar as is here material, these letters state that the territorial waters of the United States are to be measured from a line which "follows the indentations or sinuosities of the coast, and is not drawn from headland to headland" *infra*, pp. 43–44) except where there are bays, gulfs or estuaries not more than ten miles wide or where there are historic exceptions.[12] With respect to

[10] The position taken in these two letters was reaffirmed in testimony by an official of the State Department before a Senate committee in March of this year. See Hearings before Senate Committee on Interior and Insular Affairs on Submerged Lands, 83d Cong., 1st Sess., pp. 1052, 1059.

[11] A statement by the appropriate executive department as to the policy which it has followed is binding and conclusive on the courts that that is the policy which has in fact been followed. *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380–381; *Ex parte Peru*, 318 U. S. 578; *United States* v. *Benner*, 24 Fed. Cas. No. 14,568 (C. C. E. D. Pa.); *United States* v. *Ortega*, 27 Fed. Cas. No. 15,971 (C. C. E. D. Pa.); *United States* v. *Liddle*, 26 Fed. Cas. No. 15,598 (C. C. D. Pa.); *The Fagernes*, L. R. (1927) P. 311 (C. A.).

[12] In the proceedings before the Special Master in *United States* v. *California*, No. 6, Original, California asserted that

islands which lie off the coast, such as Santa Catalina, each island is regarded as having its own marginal belt (*infra*, p. 46). As to the water between the island and the mainland, it is considered a strait and, if the entrances are more than six miles in width, the belt of territorial waters should be measured in the ordinary way, that is, three miles along the coast and three miles around the island (*infra*, p. 47)."[11] Thus inland waters, the land underlying which is owned by the states in trust for their citizens under the doctrine enunciated in *Pollard's Lessee* v. *Hagan*, 3 How. 212, are restricted to bays of deep indentation ten miles or less across the mouth, harbors, rivers, and channels leading to other island waters and do not

---

certain areas here involved were "inland waters" by reason of historic usage and exceptions to the general rule. The United States challenged this assertion and, after taking evidence, the Special Master found against California (see Report of Special Master ordered filed November 10, 1952, pp. 30–39). Here, the appellants invoke no claim of historic exception save as they generally adopt the position taken by California in the earlier case. The position of the United States is fully set forth at pages 107 to 151 of its brief before the Special Master and at pages 47–78 of its reply brief, to which this Court is respectfully referred.

Additional copies of the Brief for the United States and the Reply Brief for the United States in *United States* v. *California* are being lodged with the Clerk. Those briefs contain a somewhat more extensive discussion of many of the propositions advanced in this brief.

[11] If the strait is less than six miles wide, but connects two areas of the high seas, then the waters are considered territorial waters, but not inland waters (*infra*, p. 47).

encompass any such expanse of water as is here claimed for California."[14]

There can be no doubt that the method of measuring territorial waters outlined above does not exceed the permissible limits of international law. The decision of the International Court of Justice in the *Fisheries Case*, I. C. J. Reports 1951, p. 116, is ample authority for the United States claim here involved. Of course, the claim of Norway which was there adjudicated covered a far more extensive area than is comprehended by the position taken by the United States as to its own territorial waters. But the very fact that the International Court approved the larger claim establishes that the lesser, which is here asserted, does not exceed internationally recognized limits.[15]

---

[14] The status of waters as "inland" or not has at least three consequences: (a) it determines whether the underlying land is owned by the federal government or the states, except as modified by the Submerged Lands Act; (b) it serves as the landward boundary for the three-mile marginal belt and therefore determines how far seaward the jurisdiction of the nation extends; and (c) it results in restrictions on the use of the waters by foreign vessels which do not exist in the marginal belt (*Research in International Law*, 1929, 23 A. J. I. L., Spec. Supp., 262; 1 Oppenheim, *International Law*, 7th ed., 1948, 415–417).

[15] It is equally clear that the decision does not hold that the territorial and inland waters of every nation are automatically extended to the limits approved for Norway, since the extent of the area depends in the first instance on the claim of the sovereign involved. See *Fisheries Case*, *supra*, pp. 131–132. This aspect of this case is pointed out in the letter of

And since the areas asserted by appellants here to be inland waters include all the area claimed by the United States and much more, they must agree that the federal claim does not exceed the allowable claim under international law. The precedents are reviewed at some length in the brief for the United States before the Special Master in *United States* v. *California* (see pp. 53–92) and the Court is respectfully referred to that brief.

The district court's determination that the waters between Santa Catalina Island and the mainland are high seas outside the boundaries of California is in perfect accord with the findings of the Special Master in *United States* v. *California* contained in his report ordered filed on November 10, 1952. The first question which the Special Master was requested to answer was (Report p. 1):

> What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

February 12, 1952, from the Secretary of State to the Attorney General where he states:

"The decision * * * leaves the choice of the method of delimitation applicable under such criteria to the national state. * * *" [Appendix, *infra*, p. 50.]

The answer made by the Special Master was (Report pp. 2–3):

> The channels and other water areas between the mainland and the offshore islands within the area referred to by California as the "over-all unit area" are not inland waters. They lie seaward of the baseline of the marginal belt of territorial waters, which should be measured in each instance along the shore of the adjoining mainland or island, each island having its own marginal belt.

It is submitted that this conclusion is amply supported by the authorities and precedents cited by the Special Master in his report.

Appellants, none the less, insist that the seaward boundary of California, established by its original Constitution, and by the 1949 statute which purports to interpret the constitutional provision, is a line three miles west of a line running from points on the mainland around the outermost of the islands which concededly are a part of California (App. Br. pp. 46–59). In reliance upon *Manchester* v. *Massachusetts*, 139 U. S. 240, and Section 4 of the Submerged Lands Act (P. L. 31, 83d Cong., 1st Sess.; 67 Stat. 31), appellants assert that California may fix its boundaries in any manner consistent with recognized principles of international law.

The fallacy in this argument is that the extent of California's territory in the marginal seas, and hence that of the United States, is not a matter

for unilateral determination by California."[16] The national character of this area was emphasized in each of the three submerged lands cases. In *United States* v. *California*, 332 U. S. 19, 35–36, the Court said:

> The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. * * *
> —The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; * * *. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. See *Chy Lung* v. *Freeman*, 92 U. S. 275, 279. The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks.

In *United States* v. *Louisiana*, 339 U. S. 699, 704, the Court said:

> The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, na-

[16] For a detailed discussion and collection of authorities on this point, see pp. 107–129 of Brief for the United States before the Special Master in *United States* v. *State of California*, No. 6, Original.

> tional defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

In *United States* v. *Texas*, 339 U. S. 707, 719, the Court said:

> * * * as pointed out in *United States* v. *California*, once low-water mark is passed the international domain is reached. * * * If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities.

Earlier, in dealing with a California regulation requiring the posting of bonds by certain aliens, this Court had invalidated the requirement as contrary to the exclusive power of the Federal Government in the field of foreign affairs. *Chy Lung* v. *Freeman*, 92 U. S. 275. The Court stated at 279–280:

> Upon whom would such a claim [by a foreign nation] be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal gov-

> ernment? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?
>
> The Constitution of the United States is no such instrument.

To the same effect, see *Hines* v. *Davidowitz,* 312 U. S. 52, 63–64.

In this realm of external sovereignty, the controlling factor is not what California asserts, but what the Nation asserts and is willing to defend. Cf. *United States* v. *Belmont,* 301 U. S. 324, 331–332. Therefore, California obviously can neither acquire territory in the marginal seas nor settle its boundaries in a manner inconsistent with the national policy.

Manchester v. *Massachusetts,* 139 U. S. 240, holds only that a State may extend its boundaries to include adjacent waters which are within national sovereignty, in that case a bay the entrance to which was less than ten miles across. That principle has been adopted in the Submerged Lands Act, for the limited purposes of that Act (P. L. 31, 83d Cong., 1st Sess.; 67 Stat. 29). That

Act purports to vest in the respective states title to the submerged lands within their boundaries as they existed when they entered the Union or as thereafter approved by Congress (Secs. 2, 3 and 4). Certainly the Act does not purport, as appellants seem to think (App. Br. 57–58), to authorize the States to extend their boundaries after their admittance to the Union beyond the limits of presently recognized national sovereignty without the specific approval of Congress.[17]

Congress has not approved the 1949 California statute, purporting to interpret the Constitution as fixing California's boundaries to include the water areas between the mainland and the off-

[17] Section 4, 67 Stat. 31, provides:

"Seaward Boundaries.—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

shore islands, upon which appellants rely (App. Br. 51–52). Moreover, the United States does not assert national claims which would include that area, similar to those made by Norway and approved by the International Court of Justice in the *Fisheries Case*, I. C. J. Reports 1951, p. 116. The established national policy has remained unaltered by that decision. See Letter of Secretary of State Acheson to Attorney General McGrath, dated February 12, 1952, *infra*, pp. 48–50. No change in the policy of the United States can be accomplished by an act of the California legislature. The national policy with respect to the waters here involved, established by the political branches of the National Government in which such matters are entrusted under our constitutional scheme, plainly is controlling here unless the appellants can demonstrate that an exception has been provided in the case of the waters here involved. *United States* v. *California*, 332 U. S. 19, 34; *Jones* v. *United States*, 137 U. S. 202, 212–214; *In re Cooper*, 143 U. S. 472, 502–503.

A departure from the general position of the United States is claimed by virtue of the Congressional acceptance of the California Constitution upon the admission of the State to the Union. If that Constitutional provision were properly interpreted to read as appellants here assert, Section 4 of the Submerged Lands Act, *supra*, would constitute a Congressional recogni-

tion of the extended boundary. However, it is apparent that the Constitutional provision defining the boundaries did not include within the State the waters here involved.

The 1849 Constitution of California, upon which appellants rely, in describing the borders of the state (after describing the southern boundary), stated (Art. XII, Sec. 4):

> thence running west, along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also, all the islands, bays and harbors along and adjacent to the coast.

This provision has remained substantially unaltered.

The geographical boundaries of the State are completely delineated without reference to the coastal islands. The reference to these islands in a separate sentence was intended to signify, we believe, only that the islands were claimed as a part of California territory, and not all of the waters between the mainland and the islands. See *In re Marincovich*, 48 Cal. App. 474, 192 Pac. 156, 158.[18]

[18] This interpretation of these constitutional provisions appears to have been shared by the California legislature prior

In any event, it cannot be said that an intention on the part of the State to include the ocean waters between the islands and the mainland within its boundaries was made so manifest by this constitutional provision as to warrant an assumption that the United States has concurred in the State's claim through the Act of Admission (9 Stat. 452). On the contrary, the State constitutional provisions obviously are required to be interpreted with reference to the usage of the United States in defining its exterior boundaries, and they have been uniformly so interpreted in the past by both the State and Federal Courts.

In *Wilmington Transportation Co.* v. *Railroad Commission of California*, 166 Cal. 741, 137 Pac. 1153 (1913), the California Supreme Court found, as the Railroad Commission there conceded, that one traveling from the mainland to Santa Catalina Island "must travel for upward of twenty miles upon the high seas, outside of the territorial jurisdiction of this state." In affirming this decision, this Court also recognized that ships in their

---

to the submerged lands controversy. Thus, the seaward boundaries of the coastal counties habitually have been described by the legislature as coinciding with the State's boundaries, and the boundary descriptions often have contained references to fixed geographical locations on the coastline of the mainland. These actions make plain the understanding of the legislature that the State boundaries extended no more than three miles from the shoreline of the mainland. See pp. 133–148 of Brief for the United States before the Special Master in *United States* v. *State of California*, No. 6, Original.

direct passage between the mainland and the Island "must traverse the high seas for upwards of twenty miles." *Wilmington Transportation Co.* v. *Railroad Commission of California,* 236 U. S. 151, 152.

In other cases, after considering the constitutional provision in the light of international law, the California courts have held that the boundaries of Santa Catalina Island extend only to the three-mile belt of marginal waters surrounding the Island. *In re Marincovich,* 48 Cal. App. 474, 192 Pac. 156 (1920). See, also, *Suttori* v. *Peckham,* 48 Cal. App. 88, 191 Pac. 960 (1920). The United States District Court for the Southern District of California also has held that a murder committed on a vessel located between this belt and the three-mile belt along the shoreline of the mainland was committed on the high seas. See *Walsh* v. *Archer,* 73 F. 2d 197 (C. A. 9).[19] In *People* v. *Stralla,* 88 P. 2d 736 (Cal. App., 1939), the problem of the extent of California's boundaries in these waters also was considered. The court held that a gambling ship located more than three miles from the shoreline of Santa Monica Bay, but within the waters encompassed by a line drawn between the headlands of the Bay, was located on the high seas, notwithstanding the objections of one judge who believed that the

[19] The Court of Appeals did not reach this issue, but its opinion sets forth the instructions of the lower court to the jury which embody the principles for which the case is cited.

entire waters between the mainland and Catalina Island were within the State boundaries. This decision was reversed by the Supreme Court of California solely on the ground that the "headland theory" applied to the waters of the Bay, and hence that California's boundaries extended three miles seaward of a line drawn between the headlands. *People* v. *Stralla*, 14 Cal. 2d 617, 96 P. 2d 941 (1939). By an application of the headland theory, it also has been held that California has jurisdiction in these marginal seas three miles seaward of a line between the headlands of San Pedro Bay. *United States* v. *Carillo*, 13 F. Supp. 121 (S. D. Calif.).[20]

Thus, the appellants' contention regarding the boundaries of the State are opposed by (a) the historic position of the United States respecting its international boundaries, (b) express decisions of the California courts and of this Court, as well as the State's own understanding of its boundary prior to 1949, and (c) the conclusions of the Special Master in *United States* v. *California*. At least 24 miles of the waters between Santa Cata-

[20] The Special Master in *United States* v. *State of California*, No. 6, Original, rejected California's claim that the waters of the Santa Monica and San Pedro Bays are inland waters of California, and that the headland theory was applicable to these bays. The question is not material here. Assuming that California has jurisdiction over the entire waters of these bays and three miles beyond, there still remains a substantial portion of high seas between the marginal belts. See map, *infra*, p. 51.

lina Island and the mainland are high seas outside of the State of California.

II

Under the Civil Aeronautics Act, flights which involve passage over the high seas are subject to the exclusive regulatory authority of the Board

It may be conceded that, in the absence of an applicable federal statute, the state authorities could regulate air transportation between the California mainland and Santa Catalina. This Court has previously held that California could regulate surface transportation between these places 'in the absence of Federal interpolation" (*Wilmington Transportation Co.* v. *Railroad Commission of California,* 236 U. S. 151, 156),[n] and the same would appear to hold true of air operations. But the plain fact is that, in the field of air transportation, Congress has interposed its authority, and in a manner which leaves no room for state regulation.

The "air transportation" over which the Civil Aeronautics Act asserts full dominion is defined in Section 1, *supra,* pp. 3–4. In subparagraph 10 of that Section, it is stated that air transportation

[n] In *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634, 639, this Court stated that its decision in the *Wilmington* case "held that transportation on the high seas between two points within the state of California, Santa Catalina Island and San Pedro, being 'local' and not involving 'passage through the territory of another state,' was subject to rate regulation by California in the absence of controlling federal legislation."

"means interstate, overseas, or foreign air transportation"." The latter terms are further defined in subparagraph 21, interstate air transportation being described (par. 21 (a)) as transportation between

> a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or *between places in the same State of the United States through the air space over any place outside thereof*; or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District of Columbia * * *. [Italics supplied.]

The italicized language is plain. Read as written, it undeniably covers flights between places in the same state over the high seas.

Appellants suggest, however, that notwithstanding this unambiguous textual definition, the operation is so predominantly local in nature that Congress must have intended to limit the scope of the definition to that transportation which passes over the territory of another state.[22] If that was the

[22] These classifications were apparently adopted by Congress for reasons of drafting convenience. The incidence of various regulatory provisions (see, *e. g.*, Section 1002 (d), *infra*, p. 41) was made dependent upon the particular classification of air transportation involved.

[23] It is not at all clear what appellants mean when they attempt to draw a distinction between "territorial boundaries" and "jurisdictional boundaries" (App. Br. 63). Per-

intention of Congress (as we shall point out *infra*, the legislative history shows the exact opposite), it would have been a very simple matter to say, as an early bill said before it was deliberately altered, transportation "between places in the same state through another state * * *" (S. 3027, 74th Cong., 1st Sess., 1935). Congress, accordingly, must be taken to have meant what it plainly stated—"*any place*" outside a state.

The conclusion that the term "interstate", as used in the Act, has a distinct statutory meaning, and that it is not limited by meanings or connotations which characterize use of the term in other contexts, is further supported by the fact that interstate air transportation is also defined in Section 1 (21) (a) to include transportation "between places in the same Territory or possession * * * of the United States."

It is also significant that "overseas" transportation, defined in Section 1 (21) (b) comprehends transportation between "a place in any State of the United States * * * and any place in a Territory or possession of the United States * * *." This definition fully covers, for example, transportation between the Territory of Alaska and a place in the United States. The fact that such

haps they intend to refer to the holding in the *Wilmington Transportation Co.* case upholding the "jurisdiction" of the state where the commerce is essentially local and does not conflict with an exercise of federal power. If so, the concept has no room here since, as is pointed out below, the federal government has preempted the field.

transportion is actually performed by flight over Canada, rather than by flight over the seas, does not mean that it is not "overseas" transportation in the statutory sense, and that it is excepted from the Act's coverage—an untenable supposition in the light of the statutory scheme." It indicates simply that "overseas" does not have the same meaning in all statutes.

Thus, the terms "interstate", "overseas", and "foreign", as used in the Civil Aeronautics Act, are terms of art, terms to be read by reference to that Act's definitions and not by reference to other contexts in which they may have varying meanings.

Examination of the legislative history completely confirms the conclusion that Congress meant precisely what it said in Section 1 (21) (a). One of the first bills for the regulation of interstate air commerce (S. 3027, 74th Cong., 1st Sess., 1935) defined interstate commerce as "commerce * * * between places in the same state through another state * * *." During the course of the hearing on S. 3027, Senator Wheeler, chairman of the subcommittee concerned, requested from Mr. Joseph Eastman, Federal Coordinator of Transportation, suggested corrections in the bill.

---

[36] The Board has regulated air transportation between the United States and Alaska since the inception of the Act. See, *e. g.*, *Air Transport Associates* v. *Civil Aeronautics Board*, C. A. D. C. No. 11,118, dismissed February 18, 1952, certiorari denied, 344 U. S. 825; *idem*, 199 F. 2d 481 (C. A. D. C.) certiorari denied, 344 U. S. 922.

Replying by a letter dated July 31, 1953, Mr. Eastman stated (Hearings Before a Subcommittee on Interstate Commerce, United States Senate, 74th Cong., 1st Session, on S. 3027, p. 68):

> * * * it is suggested * * * that after the word "through" in line 18 there be substituted for the words "another state", the words "the air space over any place outside thereof." The latter change would include as interstate commerce *transportation between points in the same state over a foreign country or the high seas as well as over another state.* [Italics added.]

The suggested change appears in all bills following the date of Mr. Eastman's letter, and is now contained, not only in Section 1 (21) of the Act, but also in Section 1 (20) which defines "air commerce" (49 U. S. C. 401 (20)).

Assuming, as we believe one must, the applicability of the federal statute in the circumstances here presented, it is entirely clear that there is no room for state action. The Civil Aeronautics Act embodies a complete and comprehensive scheme of regulatory control. Tariffs for interstate air transportation must be filed by air carriers with the Board and must be strictly observed (Section 403, *infra*, p. 39). The Board has plenary authority to fix rates and charges (Section 1002 (d); 49 U. S. C. 642, *infra*, p. 41) and, also, to prescribe carrier practices in connection with the performance of transportation (Sections 404, 411; 49

U. S. C. 484, 491). Operations may be instituted, suspended or terminated only by leave of the Board (Sections 401 (a), (k); 49 U. S. C. 481 (a), (k)). The determination whether service is adequate (Sections 404, 1002; 49 U. S. C. 484, 642), the prescription of requirements for the maintenance of accounts and records (Section 407, 49 U. S. C. 487), the supervision of contracts between carriers affecting air transportation (Section 412, 49 U. S. C. 492), and the screening of intercorporate relationships involving air carriers (Sections 408, 409; 49 U. S. C. 488, 489) are likewise matters fully committed to the Board.

Under its statutory mandate, the Board has exercised complete control over operations between the California mainland and Santa Catalina since the adoption of the federal statute in 1938. California cannot fix rates for the Catalina operations in the light of the power conferred upon the Board to fix rates for the same transportation. *Wilmington Transportation Company* v. *Railroad Commission of the State of California*, 236 U. S. 151, 156; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 467–8; *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 775–6. Similarly, with respect to other phases of regulation, it may be categorically stated that there is no room for both federal and state control, and that the federal power is dominant and exclusive.

CONCLUSION

The district court correctly determined that regulation of the Catalina operations falls within the exclusive province of the Civil Aeronautics Board.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
JOHN F. DAVIS,
RALPH S. SPRITZER,
Special Assistants to the Attorney General.
EMORY T. NUNNELEY, JR.,
General Counsel,
JOHN H. WANNER,
Associate General Counsel,
O. D. OZMENT,
Attorney,
Civil Aeronautics Board.

NOVEMBER, 1953.

APPENDIX

The Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.*:

SEC. 403 (a) Every air carrier and every foreign air carrier shall file with the [Board], and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the [Board], all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the [Board] shall by regulation prescribe; and the [Board] is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the [Board] to be specified in such tariffs, except those specified therein. Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the [Board] may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees and their immediate families; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the [Board] may by regulations prescribe.

(c) No change shall be made in any rate fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier,

except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The [Board] may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(d) Every air carrier or foreign air carrier shall keep currently on file with the [Board], if the [Board] so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates.

SEC. 1002 * * *

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the [Board] shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the [Board] shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective:

Provided, That as to rates, fares, and charges for overseas air transportation, the [Board] shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

Letters From the State Department to the Attorney General

IN REPLY REFER TO L/EUR

Department of State,
Washington, November 13, 1951.

My Dear Mr. Attorney General: Reference is made to your letter dated October 30, 1951, requesting a statement from the Department of State in regard to the position of the United States as to the principles or criteria which govern the delimitation of the territorial waters of the United States. You ask in particular how such delimitation is made in the case of:

(a) A relatively straight coast, with no special geographic features, such as identations or bays;

(b) A coast with small indentations not equivalent to bays;

(c) Deep indentations such as bays, gulfs or estuaries;

(d) Mouths of rivers which do not form an estuary;

(e) Islands, rocks or groups of islands lying off the coast;

(f) Straits, particularly those situated between the mainland and offshore islands.

In the formulation of United States policy with respect to territorial waters and in the determination of the principles applicable to any problem

connected therewith, such as the problem of delimiting territorial waters, the Department of State has been and is guided by generally accepted principles of international law and by the practice of other states in the matter.

(a) In the case of a relatively straight coast, with no special geographic features such as indentations c bays, the Department of State has traditionally taken the position that territorial waters should be measured from the low water mark along the coast. This position was asserted as early as 1886 (The Secretary of State, Mr. Bayard, to Mr. Manning, Secretary of the Treasury, May 28, 1886, I Moore, *Digest of International Law*, 720). It was maintained in treaties concluded by the United States. (See Article 1 of the Convention concluded with Great Britain for the Prevention of Smuggling of Intoxicating Liquors on January 23, 1924, 43 Stat. 1761.) This position was in accord with the practice of other states. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany, and the Netherlands for regulating the Police of the North Sea Fisheries signed at The Hague, May 6, 1882, 73 *British and Foreign State Papers*, 39, 41, and Article 2 of the Convention between Germany, Denmark, Estonia, Finland, France, the British Empire, Italy, Latvia, Poland and Sweden, relating to the Non-Fortification and Neutralization of the Aaland Islands, concluded at Geneva on October 20, 1921, 9 *League of Nations Treaty Series*, 212, 217.) The United States maintained the same position at the Conference for the Codification of International Law held at The Hague in 1930. (See League of Nations,

Bases of Discussion for the Conference for the Codification of International Law, II, Territorial Waters, C. 74 M. 39, 1929, V., 143, hereinafter referred to as *Bases of Discussion*.) The report of the Second Sub-Committee adopted the low water mark as the base line for the delimitation of territorial waters. (League of Nations, Acts of the Conference for the Codification of International Law, III, Territorial Waters, C. 351 (b) M. 145 (b), 1930, V., 217, hereinafter referred to as *Acts of Conference*.)

(b) The Department of State has also taken the position that the low water mark along the coast should prevail as the base line for the delimitation of territorial waters in the case of a coast with small indentations not equivalent to bays: the base line follows the indentations or sinuosities of the coast, and is not drawn from headland to headland. This position was already established in 1886. (See the letter from the Secretary of State Mr. Bayard to Mr. Manning, Secretary of the Treasury, dated May 28, 1886, *supra*.) The United States maintained this position at the Hague Conference of 1930. (See Amendments to Bases of Discussion proposed by the United States, *Acts of Conference*, 197.) The principle that all points on the coast should be taken into account in the delimitation of territorial waters was adopted in the report of the Second Sub-Committee (*Acts of Conference*, 217).

(c) The determination of the base line in the case of a coast presenting deep indentations such as bays, gulfs, or estuaries has frequently given rise to controversies. The practice of states,

nevertheless, indicates substantial agreement with respect to bays, gulfs or estuaries no more than 10 miles wide: the base line of territorial waters is a straight line drawn across the opening of such indentations, or where such opening exceeds 10 miles in width, at the first point therein where their width does not exceed 10 miles. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands, for regulating the Police of the North Sea Fisheries, signed at The Hague, May 6, 1882, 73 *Foreign and British State Papers,* 39, 41; The North Atlantic Coast Fisheries Arbitration between the United States and Great Britain of September 7, 1910; *U. S. Foreign Rel.,* 1910 at 566; and the Research in International Law of the Harvard Law School, 23 American Journal of International Law, SS, 266.

Subect to the special case of historical bays, the United States supported the 10 mile rule at the Conference of 1930 (*Acts of Conference,* 197–199) and the Second Sub-Committee adopted the principle on which the United States relied (*Acts of Conference,* 217–218). It was understood by most delegations that, as a corollary to the adoption of this principle, a system would be evolved to assure that slight indentations would not be treated as bays (*Acts of Conference,* 218). The United States proposed a method to determine whether a particular indentation of the coast should be regarded as a bay to which the 10 mile rule would apply (*Acts of Conference,* 197–199). The Second Sub-Committee set forth the American proposal and a compromise proposal offered

by the French delegation in its report, but gave no opinion regarding these systems (*Acts of Conference,* 218–219).

(d) With respect to mouths of rivers which do not flow into estuaries, the Second Sub-Committee agreed to take for the base line a line following the general direction of the coast and drawn across the mouth of the river, whatever its width (*Acts of Conference,* 220).

(e) With respect to the measurement of territorial waters when rocks, reefs, mudbanks, sandbanks, islands or groups of islands lie off the coast, the United States took the position at the Conference that separate bodies of land which were capable of use should be regarded as islands, irrespective of their distance from the mainland, while separate bodies of land, whether or not capable of use, but standing above the level of low tide, should be regarded as islands if they were within three nautical miles of the mainland. Each island, as defined, was to be surrounded by its own belt of territorial waters measured in the same manner as in the case of the mainland (*Acts of Conference,* 200).

The report of the Second Sub-Committee defined an island as a separate body of land, surrounded by water, which was permanently above high water mark, and approved the principle that an island, so defined, had its own belt or territorial sea (*Acts of Conference,* 219). While the Second Sub-Committee declined to define as islands natural appendages of the sea-bed which were only exposed at low tide, it agreed, nevertheless, that such appendages, provided they were situated within the territorial sea of the mainland,

should be taken into account in delimiting territorial waters (*Acts of Conference,* 217).

(f) The problem of delimiting territorial waters may arise with respect to a strait, whether it be a strait between the mainland and offshore islands or between two mainlands. The United States took the position at the Conference that if a strait connected two seas having the character of high seas, and both entrances did not exceed six nautical miles in width, all of the waters of the strait should be considered territorial waters of the coastal state. In the case of openings wider than six miles, the belt of territorial waters should be measured in the ordinary way (*Acts of Conference,* 200–201). The report of the Second Sub-Committee supported this position with the qualification that if the result of this determination of territorial waters left an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area could be assimilated to the territorial sea (*Acts of Conference,* 220).

The Second Sub-Committee specified in its observations on this subject that the waters of a strait were not to be regarded as inland waters, even if both belts of territorial waters and both shores belonged to the same state (*Acts of Conference,* 220). In this, it supported the policy of the United States to oppose claims to exclusive control of such waters by the nation to which the adjacent shore belonged. (The Secretary of State, Mr. Evarts, to the American Legation, Santiago, Chile, January 18, 1879, in connection with passage through the Straits of Magellan, I Moore, *Digest of International Law,* 664). With respect to a strait which is merely a channel of communi-

cation to an inland sea, however, the United States took the position, with which the Second Sub-Committee agreed, that the rules regarding bays should apply (*Acts of Conference*, 201, 220).

In connection with the principles applicable to bays and straits, it should be noted that they have no application with respect to the waters of bays, straits, or sounds, when a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority. The United States specifically reserved this type of case at the Hague Conference of 1930 (*Acts of Conference*, 197).

The principles outlined above represent the position of the United States with respect to the criteria properly applicable to the determination of the base line of territorial waters and to the demarcation between territorial waters and inland waters.

Sincerely yours,

JAMES E. WEBB,
Acting Secretary.

The Honorable J. HOWARD MCGRATH,
Attorney General.

IN REPLY REFER TO L/EUR

DEPARTMENT OF STATE,
Washington, February 12, 1952.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to your letter of January 22, 1952, inquiring whether, in the light of the decision of the International Court of Justice in the Fisheries Case (*United Kingdom* v. *Norway*) in date of December 18, 1951, the Department adheres to the statement of position given at your request on Novem-

ber 13, 1951, with respect to the principles or criteria governing the delimitation of the territorial waters of the United States.

The Department noted the holding of the Court that the Norwegian Government in fixing the base lines for the delimitation of Norwegian fisheries by applying the straight base lines method had not violated international law, especially in view of the peculiar geography of the Norwegian coast and of the consolidation of this method by a constant and sufficiently long practice.

The decision of the Court, however, does not indicate, nor does it suggest, that other methods of delimitation of territorial waters such as that adopted by the United States are not equally valid in international law. The selection of base lines, the Court pointed out, is determined on the one hand by the will of the coastal state which is in the best position to appraise the local conditions dictating such selection, and on the other hand by international law which provides certain criteria to be taken into account such as the criteria that the drawing of base lines must not depart to any appreciable extent from the general direction of the coast, that the inclusion within those lines of sea areas surrounded or divided by land formations depends on whether such sea areas are sufficiently closely linked to the land domain to be subject to the regime of internal waters, and that economic interests should not be overlooked the reality and importance of which are clearly evidenced by long usage.

In the view of the Department, the decision of the International Court of Justice in the Fisheries Case does not require the United States to change

its previous position with respect to the delimitation of its territorial waters. It is true that some of the principles on which this United States position has been traditionally predicated have been deemed by the Court not to have acquired the authority of a general rule of international law. Among these are the principle that the base line follows the sinuosities of the coast and the principle that in the case of bays no more than 10 miles wide, the base line is a straight line across their opening. These principles, however, are not in conflict with the criteria set forth in the decision of the International Court of Justice. The decision, moreover, leaves the choice of the method of delimitation applicable under such criteria to the national state. The Department, accordingly, adheres to its statement of the position of the United States with respect to delimitation of its territorial waters in date of November 13, 1951.

Sincerely yours,

DEAN ACHESON.

The Honorable J. HOWARD MCGRATH,
Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1965

SANTA MONICA BAY

PT. F

SAN PEDRO BAY

PT. FERMIN

NEWPORT BEACH

UNITED STATES - WEST COAST
CALIFORNIA

SAN DIEGO TO SANTA ROSA ISLAND

GULF OF SANTA CATALINA

LINES INDICATING 3-MILE MARGINAL BELT

5101

(San Diego to Santa Rosa Island) USCGS 5101